requirements consistent with due process; (c) the HDO cannot be reconciled with Fox and Speer, supra; and (d) these errors irreparably taint this proceeding and require that the record be vacated.

B. The Commission Will Redress an Improvident HDO

This is Trinity's first opportunity under the Commission's rules to challenge the flawed premise of the HDO. A petition for reconsideration was precluded because the HDO did not deny or restrict Trinity's participation in the hearing. 47 C.F.R. §1.106(a)(1). Likewise, Trinity could not challenge the HDO before the ALJ or the Review Board, since the HDO was controlling on both. Frank H. Yemm, 39 RR 2d 1657, 1659 (1977); Algreg Cellular Engineering, 9 FCC Rcd 5098, 5122 (Rev. Bd. 1994); Western Cities Broadcasting, Inc., 6 FCC Rcd 2325, 2326 (Rev. Bd. 1991); Empire State Broadcasting Corporation (WWKB), 5 FCC Rcd 2999, 3005 (Rev. Bd. 1990). However, Trinity *does* have the right to raise such a challenge when the Commission reviews the decision below. Algreg Cellular Engineering, supra, 9 FCC Rcd at 5123; Western Cities Broadcasting, Inc., supra.

The Commission has an obligation to redress the improvident designation of issues for hearing. It has done so in other cases where (as here) the Commission itself designated the issues, WOIC, Inc., 44 FCC 2d 891, 893 (1974), and where (as here) full hearings were already held, United Broadcasting Company, 93 FCC 2d 482, 491-92 (1983), Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1096-97 (Rev. Bd. 1982). Whether redress is by deletion of the issues (WOIC, supra) or simply by declaring the applicant exonerated (United Broadcasting, supra, 93 FCC 2d at 499-500; Scott & Davis, supra), correction of an improvident designation is a matter of basic due process.[6]

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[6] *See also*, Southern Broadcasting Co., 40 FCC 2d 1109 (1973) (deleting improvidently designated issue); Western Union Telegraph Company, 59 FCC 2d 1508 (1976) (terminating "improvidently designated" investigation); City of Brownsville, Tex., 12 FCC 2d 527 (1968) (terminating erroneously designated hearing); All America Cables and Radio, Inc., 69 FCC 2d 1650 (continued...)

Here, it is inconceivable that considerations of operating control would have led the Commission to designate the Trinity issues in 1993 if the Commission had remembered and re-examined the policies underlying the minority LPTV lottery preference and minority ownership exception -- policies developed in the early 1980's under pressure from Congress which establish conclusively that operating control considerations did *not* apply. Likewise, it is inconceivable that the Commission would have designated the Trinity issues if it had known that its own staff had applied that very approach when it reviewed NMTV's Odessa application under the minority ownership exception in 1987 and decided *not* to request information about NMTV's operations.

C. The Minority LPTV Lottery Preference Applied Without Consideration of Operating Control

Designation of the abuse of process issue with respect to NMTV's LPTV applications was based on the mistaken proposition that NMTV "would not have been entitled to minority preferences in numerous LPTV lotteries" if Trinity or its president Paul Crouch controlled NMTV. 8 FCC Rcd at 2480 (¶38). That statement of law in the HDO is demonstrably erroneous. The Commission had adopted the minority LPTV lottery preference in 1983 because Congress mandated the preference in order to increase minority ownership *per se* without regard to control, and that mandate became the Commission's policy. Because the HDO completely overlooked this history and the policy underlying the minority LPTV lottery preference, designation of the issue was improvident.[7]

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[6](...continued)
(Rev. Bd. 1978) (deleting improvidently designated issue).

[7] Although this motion addresses policies that by their terms would have permitted Trinity to control NMTV, the motion is not to be construed as saying that Trinity in fact did control NMTV. To the contrary, as Trinity has made clear in other pleadings, the record and applicable case law under the *de facto* control issue show that Trinity did not control NMTV or intentionally violate standards (continued...)

1. The Original Lottery Statute

a. First Congressional Mandate

The basic error that has driven this proceeding since the HDO is the assumption that all of the Commission's minority ownership policies include the requirement that minorities be in actual working control. That is demonstrably not so. Indeed, distinctly differing standards of "minority ownership" were developed for the various minority preference programs administered by the Commission.

To be sure, actual working control by minorities *was* required under one category of minority preferences initiated by the Commission. Statement of Policy on Minority Ownership of Broadcast Facilities, 92 FCC 2d 849, 855 (1982) ("1982 Minority Policy Statement") (20% minority ownership *and* minority control required for limited partnerships under minority tax certificate and distress sale policies). However, in a second category of minority preferences -- prompted by the Court of Appeals in TV 9, Inc. v. FCC, 495 F. 2d 929, 937 (D.C. Cir. 1973) -- enhancements for "minority stock ownership" and participation were accorded in comparative hearings without regard to whether minorities controlled. And in a third category of minority programs, which encompassed both the minority LPTV lottery preference and the minority ownership exception at issue here, the standard

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[7](...continued)
that range from nebulous to non-existent. Exceptions to Initial Decision, January 23, 1996 ("Trinity Exceptions"); *see also,* Telephone and Data Systems, Inc. v. FCC, 19 F. 3d 42, 50 (D.C. Cir. 1994) (remanding proceeding in light of the Commission's own difficulty in construing the *de facto* control policy consistently). Indeed, a sad irony of this proceeding is that, taking the Commission's minority ownership policies at face value, Trinity is one of the very few broadcasters that has truly furthered the goals of those policies. Trinity's efforts have brought minorities into broadcast employment, management, and ownership, and NMTV provides exemplary service to the minority community -- important facts that the ID totally ignores because the ALJ erroneously excluded nearly all such evidence as irrelevant. *See* pp. 76-77 infra.

was more than 50% beneficial ownership *per se*. This standard was dictated by Congress, which imposed the minority lottery preference and minority ownership exception on a reluctant Commission.

The beneficial ownership definition of "minority-controlled" stemmed from Public Law 97-35, enacted in August 1981, which amended §309 of the Communications Act to give the Commission discretionary lottery authority.[8] New §309(i)(3)(A) directed the agency to grant "significant preferences" to groups underrepresented in the ownership of communications facilities. **Tab 5**, pp. 3-4. The accompanying Conference Report stated that the intended beneficiaries, which included minorities, were groups not adequately represented in "telecommunications *ownership*" and that the intended objective was to increase the number of "media outlets *owned*" by such persons.[9]

b. Commission Reaction

The Commission at first seemed to embrace the beneficial ownership standard as the basis for minority preferences in lotteries. In Random Selection /Lottery Systems, 88 FCC 2d 476, 485 (1981) ("Lottery NPRM"), it stated that the new lottery legislation appeared to reflect the view that "diversifying ownership of mass media is important in promoting competition in the economic and ideological marketplaces." The Commission tentatively concluded that "over 50 percent ownership" by underrepresented persons would be the basis for the preference and that, in the case of trusts, "only the underrepresented status of the beneficiary should be counted." Id. at 487, 488. That tentative conclusion with respect to trusts in particular negated any notion that control, rather than ownership, would determine eligibility for the lottery preference, for generally it is not the beneficiary

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[8] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357 (1981). *See* **Tab 5**.

[9] H.R. Rep. No. 97-208, 97th Cong., 1st Sess. (1981), *reprinted in* 1981 U.S.C.C.A.N. 1010, 1259. **Tab 6**, p. 4 (emphasis added).

(but the trustee) who controls trust decisions. Consistent with that approach, the Commission proposed a new rule (§1.2002(a)) that would grant a preference to any applicant having "over 50 percent *ownership*" by members of underrepresented groups. 88 FCC 2d at 498 (emphasis added). Thus, in its initial reaction to new §309(i)(3)(A), the Commission tentatively endorsed the beneficial ownership definition of "minority controlled" for purposes of congressionally authorized lotteries.[10]

However, three months later in February 1982, the Commission retreated from its initial endorsement of a minority preference in lotteries. In its Report and Order in Random Selection/ Lottery Systems, 89 FCC 2d 257, 281 (1982), the Commission majority concluded that Congress' statutory intent was unclear and that preferences based solely on race or gender would likely be found unconstitutional. For this and other reasons, the Commission took the extraordinary step of declining to implement procedures for a lottery as mandated by Congress.

2. The Revised Lottery Statute

a. Second Congressional Mandate

Reacting almost immediately to the Commission's refusal to implement procedures for a discretionary lottery, Congress enacted Public Law 97-259 in September 1982.[11] This statute added the current version of §309(i)(3) to the Communications Act, which required the Commission to

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[10] Further supporting the concept of ownership rather than working control, the Commission stated that the over 50% ownership requirement could be met "by aggregated ownership interests of different types of underrepresented groups. For example, a broadcaster could show that the applicant corporation was owned 30% by Black, 20% by Hispanic and 10% by White female shareholders. The combined preference ownership, in this hypothetical example exceeds the over 50 percent ownership requirement. Although this approach does not lead to a unified minority voice, arguably the applicant would be sensitive to the needs of its various minority owners." Lottery NPRM, 88 FCC 2d at 487.

[11] Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094 (1982). *See* **Tab 7**.

grant a significant minority preference to any applicant "controlled" by members of a minority group. **Tab** 7, p. 3. The goal, stated explicitly in the statute, was to diversify mass media "ownership." Id. The accompanying Conference Report made clear that "control" by minorities merely meant majority ownership and nothing more: "The Conferees intend that in the administration of a lottery . . . the Commission award a significant minority ownership preference to those applicants, *a majority of whose ownership interests* are held by a member or members of a minority group."[12]

Significantly, the Conference Report also incorporated two important aspects of minority preferences found in the Commission's initial Lottery NPRM. First, the Conference Report made clear Congress' intention that minorities be allowed to aggregate their ownership interests into one interest exceeding 50% to qualify for a preference. **Tab 8**, p. 7. Second, the Conference Report explicitly adopted the Commission's ownership definition of "minority control" as it related to trusts. **Tab 8**, p. 8. Moreover, it extended that standard to corporations and partnerships as well. The Conference Report stated:

> "With respect to both the media ownership and minority ownership preferences, the Conferees expect that the Commission shall evaluate ownership in terms of the *beneficial owners* of the corporation, or the *partners* in the case of the partnership. Similarly, trusts will be evaluated in terms of the identity of the *beneficiary*." Id. (emphasis added).

As of 1982, then, both "minority ownership" and "minority control" for purposes of the lottery statute meant (as far as Congress was concerned) more than 50% beneficial ownership by minorities.

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[12] H.R. Rep. No. 97-765, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2261, 2284, 2287-89 ("Conference Report") (**Tab 8**, p. 7) (emphasis added). By basing the preference on a majority of minority ownership interests *per se*, regardless of operating control, Congress served its aim of "remedying past economic disadvantage to minorities" as well as program diversity goals. Id.

b. Commission Response

Soon after Congress enacted this second lottery mandate, a chastised Commission moved to implement the statute. Issuing a Second Notice of Proposed Rule Making, 91 FCC 2d 911 (1982), the Commission proposed to adopt a minority preference for LPTV lotteries. In determining eligibility for the minority preference, the Commission took its direction from the Conference Report, which said that ownership was to be evaluated in terms of "the partners in the case of a partnership" and "the identity of the beneficiary" in the case of a trust. Id. at 924, 925 (*quoting* Conference Report at 45). In partnerships, said the Commission, this included "both general and limited partnership interests." To determine a partnership's eligibility for the preference, the Commission suggested two possible approaches, neither of which had anything at all to do with operating control. One was based on the "profit interests attributable to each of the general and limited partners," so that the applicant would qualify for the minority preference simply if "more than 50% of the partnership applicant's profit [would] be paid to minority group partners." Id. at 924. The second approach was based on the "capital accounts of the general and limited partners," so that the applicant would qualify for the preference simply "if the capital accounts of the minority group partners equal more than 50% of the firm's total capital accounts." Id. at 924. Then, in a statement of critical significance for the present case since NMTV is a nonstock corporation, the Commission asserted: "We intend to treat non-stock corporations and unincorporated associations in a manner similar to partnerships in which each member holds an equal share." Id. at 925.

The Commission likewise focused on beneficial ownership of trusts and corporations:

> "With regard to the minority ownership preference, the Commission will take into account the racial or ethnic characteristics of all of the named trust *beneficiaries*. If over 50% of the applicant trust's *beneficiaries* are minorities, the applicant trust will

be entitled to a minority preference in the lottery.... It is our intention to require corporate applicants seeking a lottery preference to specify the *beneficial owners* of the corporation." Id. (emphasis added).

Thus, if a non-minority trustee controlled a trust in which wholly passive minorities owned more than 50% of the beneficial interests, or if minorities owned the beneficial interest in more than 50% of a corporation's stock that was held and voted in street name by a non-minority investment company, such entities would qualify for the minority preference because minorities would own more than 50% of the beneficial interests. Punctuating its intent that ownership *per se* would determine eligibility for the minority preference, the Commission proposed a new rule (§1.1622) that would contain the following provisions:

> "(a) Any applicant desiring a preference in the random selection . . . shall list *any owner* . . . who is a member of a minority group. . . . Such an applicant shall also state whether more than 50% of the *ownership interests* in it are held by members of minority groups . . . .
>
> "(b) Preference factors . . . shall be granted as follows:
>
> "(1) Applicants, more than 50% of whose *ownership interests* are held by members of minority groups -- 2:1.
>
> . . . .
>
> "(d) Preferences will be determined on the basis of applicants' *ownership* as of the date of the most recent Public Notice which lists all applications acceptable for filing . . . ." Id. at 933 (emphasis added).

The Commission also proposed a rule to implement its intention to treat the members of nonstock corporations equivalent to *pro rata* partners in a partnership (proposed rule §1.1621(c)(4)). Id.

c. Adoption of the Preference

After receiving comments on these proposals, the Commission in March 1983 adopted the preferences "generally as proposed." Random Selection Lotteries, 93 FCC 2d 952, 974 (1983) ("Second Lottery Order"). Noting that the Conference Report emphasized "beneficial ownership

interests," the Commission reaffirmed that both general and limited partnership interests would be considered in determining the ownership of a partnership, and held that ownership would be measured by "profit shares." Id. at 976. Thus, if a non-minority general partner controlled a partnership in which minorities held more than 50% of the profit shares through passive limited partnership interests, the partnership would qualify for the minority preference. Similarly, the owners of a trust would be the beneficiaries, measured not by active participation or operating control, but by "the percentage each beneficiary derives" from the trust. Id. at 977. And the owners of voting stock in a corporation would be the beneficial owners thereof. Id. Furthermore, the percentage of minority beneficial ownership of corporations with more than 50 shareholders could be derived from sampling procedures used to determine alien ownership interests, which measure passive as well as active ownership interests. Id.

The Commission also adopted its proposal to treat the members of nonstock corporations as equivalent to *pro rata* partners of a partnership. Id. Anticipating substantial participation by nonprofit and nonstock corporations in LPTV lotteries, the Commission focused on the definition of ownership of such entities and concluded that the minority status of nonstock corporations having members would be determined by "the composition of the membership," and the minority status of such corporations not having members would be determined by "the composition of the board." Id. at 976, 977. Once again demonstrating that the active or passive nature of minority membership was irrelevant, the Commission authorized the use of recognized sampling methods to determine the minority ownership percentage of organizations with more than 50 members. Id. at 977. The Commission further affirmed that members of different minority groups could aggregate their ownership interests to achieve a majority interest in any given application. Id. at 975. Having made

these determinations, it proceeded to adopt new Rule §1.1622, including §1.1622(a) (applicants claiming minority preference should identify "any owner" who is a minority and state whether more than 50% of the "ownership interests" are held by minorities), §1.622(b)(1) (applicants more than 50% of whose "ownership interests" are held by minorities entitled to 2:1 preference), and §1.622(d) (preferences to be determined on basis of "ownership interests" as of a specified date). Id. at 1007.

Thus, as directed by Congress, eligibility for the minority LPTV lottery preference was expressly defined in terms of *beneficial* ownership, including purely *passive* interests, so that entities in which minorities held more than 50% ownership could claim the preference even if the minority owners did not exercise or have control. The Commission explained that this should increase the number of entities eligible for the minority preference and would serve the intent of Congress that the Commission "evaluate ownership in terms of the beneficial owners." Id. at 976. From all of this it is clear that the minority LPTV lottery preference was based on the Congressional mandate to increase minority ownership *per se*, and that operating control was irrelevant.

d. Chairman Fowler's Separate Statement

Although the Commission dutifully followed the Congressional mandate in the Second Lottery Order, some Commissioners did so reluctantly. In a Separate Statement, Chairman Mark Fowler sharply criticized the minority ownership *per se* rule. Declaring the preference scheme constitutionally unsound, he asserted that "[n]o compelling reason animated Congress to etch racial preferences into the lottery system. . . . Congress seemingly assumed that diversity of broadcast programming would be advanced by increasing broadcast ownership by minorities. There is not a scintilla of evidence based on experience or otherwise to support this assumption." Id. at 1019 and n. 12 (Separate Statement of Chairman Mark S. Fowler). Still, as Chairman Fowler acknowledged, the Commission

was obligated to implement the lottery statute enacted by Congress with its beneficial ownership definition of "minority control." Id. at 1020 n. 19 ("I also believe it is my duty to administer faithfully the lottery statute enacted by Congress despite my doubts as to its constitutionality").

3. Mass Media Bureau's Position

Although the HDO considered none of the relevant history of the minority LPTV lottery preference, the Mass Media Bureau recognized in this proceeding that the HDO had improvidently charged Trinity with abusing that policy. In its proposed findings of fact and conclusions of law filed in August 1994, the Bureau succinctly described the minority LPTV lottery preference as follows:

> "A minority preference was available to applicants whose *beneficial minority ownership*, including that conferred by a limited partnership interest or a beneficial interest in a trust, exceeded 50%. Thus, to qualify for a minority preference, the *ownership* of the applicant, and *not working control*, was all important." MMB F&C ¶33 (emphasis added).

Further, the Bureau said:

> "Section 1.1601, et seq., of the Commission's Rules provides that an LPTV applicant whose minority group *ownership interest* is more than 50 percent is entitled to claim a minority preference in an LPTV lottery. The practice of considering minority preferences in LPTV lotteries was adopted by the Commission in 1983. See Random Selection Lotteries, 93 FCC 2d 952 (1983). In developing its minority preference scheme, *the Commission emphasized minority 'ownership' over minority 'control.'* Thus, for example, the Commission articulated that the minority status of a non-stock, non-profit corporation should be determined upon the basis of the 'composition of the company's board.' Random Selection Lotteries, 93 FCC 2d at 977 (1983). In a Public Notice, No. 6030, released August 19, 1983, the Commission again expressed its view that a non-stock entity a majority of whose governing board consists of minorities is entitled to claim a minority preference in an LPTV lottery." Id. at ¶304 (emphasis added).

Thus, the Bureau by 1994 had acknowledged the legal error of the premise in the HDO that working control determined eligibility for the preference.

The August 1983 Public Notice to which the Bureau referred gave the following instructions

regarding eligibility for the minority LPTV lottery preference:

> "c. Unincorporated associations or nonstock corporations with members. If a majority of the members are minorities, the entity is entitled to a minority preference.
>
> "d. Unincorporated associations or nonstock corporations without members. If a majority of the governing board (including executive boards, boards of regents, commissions and similar governmental bodies where each board member has one vote) are minorities, the entity is entitled to a minority preference." TBF Ex. 101, Tab F, p. 4; TBF Ex. 105, Tab G, p. 4.

NMTV's Bylaws provided that "[t]he members of this corporation shall be the persons who from time to time are the members of the Board of Directors of this corporation." TBF Ex. 101, Tab D, p. 1; TBF Ex. 104, Tab D, p. 1; TBF Ex. 105, Tab F, p. 1. Therefore, whether considered a nonstock corporation with members, or one without members, NMTV was entitled to a minority preference if the majority of its Board of Directors were minorities. The Bureau thus concluded:

> "The record evidence establishes that TTI/NMTV, a non-stock corporation, claimed an entitlement to a minority preference in several LPTV applications. The record evidence further establishes that on those instances when it claimed a minority preference, a majority of TTI/NMTV's board of directors consisted of members of recognized minority groups. Since it is, and at all relevant times has been, the Commission's policy to determine eligibility for a minority preference in a non-stock corporate LPTV applicant *exclusively* on the basis of the composition of the applicant's governing board, and TTI/NMTV is a non-stock corporation a majority of whose directors, at all relevant times, consisted of minorities, it must be concluded that TTI/NMTV was entitled to claim a minority preference in LPTV lotteries. Therefore, to the extent that TTI/NMTV claimed an entitle[ment] to minority preferences in Commission LPTV lotteries, neither TTI/NMTV, Crouch nor TBN abused the Commission's processes." MMB F&C ¶305 (emphasis in original).[13]

After the ALJ in the ID blindly disregarded the plain language of the minority LPTV lottery policies (*see* pp. 77-78 infra), the Bureau highlighted that error. In reply to exceptions it declared:

> "The Bureau agrees with TBN that the evidence does not support a conclusion that NMTV abused the Commission's processes with respect to its low power television

[13] TTI stands for Translator T.V., Inc., NMTV's original corporate name.

> applications. The Commission's low power rule making proceedings and its public notice and accompanying instructions for claiming preferences indicated that *mere ownership* of more than 50% of a low power television applicant was sufficient to support a minority preference claim. See Low Power Television Broadcasting, 82 FCC 2d 47, 75 (1980); Random Selection Lotteries, 93 FCC 2d 952, 976-77 (1983); TBF Ex. 105, Tab G. Thus, in the case of a non-stock corporation like NMTV one would look only to its board of directors to determine whether the corporation was minority-controlled within the meaning of the low power television rules and policies. During all times relevant to this proceeding, the majority of NMTV's board of directors, its legally constituted governing body, consisted of members of minority groups. Counsel for TBN advised TBN personnel as to the requirements of the law, and they relied upon that advice when they claimed the minority preference for NMTV. ID at ¶¶35, 40 and 43." MMB Reply, p. 2 (¶3) (emphasis added) (footnote omitted).

The Bureau then directly confronted the question on which designation of the issue had turned, saying:

> "The Commission did not clarify that both *de jure* and *de facto* control of a low power applicant by members of minority groups was necessary before a minority preference could be claimed until the Hearing Designation Order, 8 FCC Rcd 2475, 2480 at ¶38 (1993) ('HDO'). Prior to that clarification, TBN and NMTV had no way of knowing that they could not legally claim a minority preference for NMTV in a low power television application if TBN controlled NMTV. Thus, prior to the release of the HDO, TBN and Crouch could not have had and did not have the intent necessary to abuse the Commission's processes with respect to NMTV's low power television and translator filings. Further, because TBN did not have actual notice that the Commission would ultimately require NMTV to have both *de jure* and *de facto* control over its operation, the ID should not have based denial on NMTV's certifications that it was entitled to a minority preference for its low power television and television translator construction permit applications." Id., pp. 2-3 (¶4).

Since the Bureau knew that the minority LPTV lottery preference turned on "beneficial minority ownership" under a policy that "emphasized minority 'ownership' over minority 'control'" (MMB F&C ¶304), and recognized that "the ownership of the applicant, and not working control, was all important" (Id. ¶33), its characterization of the HDO as a "clarification" of the policy was remarkably generous. In truth, the HDO was a complete and unexplained *reversal* of the policy,

since the Commission was now purporting to emphasize working control over ownership. In any event, whether termed a "clarification" or an outright reversal, the HDO (as the Bureau essentially concedes) improvidently charged Trinity with having intentionally violated a supposed policy *first announced in the very order that made the charge*.[14]

In short, since the LPTV abuse of process issue was designated on the erroneous premise that *de facto* control determined eligibility for the minority LPTV lottery preference, and since there was no *prima facie* evidence that Trinity intentionally abused the policy, the HDO improvidently designated that issue. As shown next, the HDO is equally flawed in designating the *de facto* control issue and alleging an abuse of the minority ownership exception. But the Bureau fails to see the flaw in *that* part of the HDO because it ignores the origins and rationale of the minority ownership exception policy.

D. The Minority Ownership Exception Likewise Applied Without Consideration of Operating Control

When the Commission adopted the Congressionally-mandated minority LPTV lottery preference in 1983 based on beneficial ownership *per se* without regard to working control, the

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[14] Actually, the HDO is legally ineffective to modify the beneficial ownership standard that the Commission adopted as the basis for the minority LPTV lottery preference. While the Commission may amend its policies, it may not do so without providing a reasoned explanation for its action. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"). Moreover, when (as here) a policy is codified in substantive rules adopted by formal rule making, the Commission may not amend the rules without further rule making. James Reeder v. FCC, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989). Finally, when (as here) an administrative agency adopts a policy pursuant to a Congressional mandate, the agency is not then free to change the policy in a way that "is inconsistent with the statutory mandate or that frustrates the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291 (1965). Legally, therefore, notwithstanding the HDO, the minority LPTV lottery preference stands today unmodified from its original adoption.

agency was also proceeding on a parallel track to develop what became the minority ownership exception, adopted in late 1984. As the history of that provision makes clear, eligibility for the minority ownership exception, like eligibility for the minority LPTV lottery preference, did not turn on the locus of operating control. The 1993 HDO was plainly wrong in stating otherwise.

1. Initial Commission Position

In the 1982 Minority Policy Statement, supra, the Commission addressed recommendations that it amend the multiple ownership rules to spur broadcast group owners to provide "managerial and technical expertise" and financing to minorities. 92 FCC 2d at 852, 853 and n. 17. It decided to defer consideration of those recommendations until an impending proceeding concerning the multiple ownership rules themselves, stating:

> "We are in the process of undertaking a comprehensive review of those rules, and we believe it is more productive at this point to consider any minority ownership implications of these rules in the context of our overall review." Id. at 853.

However, when it later proposed rules in the multiple ownership proceeding, the Commission advanced no specific proposals to enhance minority ownership. Multiple Ownership of Broadcast Stations, 95 FCC 2d 360 (1983) ("Multiple Ownership NPRM"). Instead, it proposed to relax the national broadcast ownership limits "to the maximum extent feasible" consistent with the record developed, which might include eliminating the limits entirely. Id. at 395. The Commission did query whether easing the national ownership limits would affect minority ownership, and suggested that increasing the allowable number of attributable interests would facilitate the ability of minorities to obtain funding from investors. Id. at 389. Significantly, the Commission noted that under the multiple ownership rules such attributable interests "are generally treated as though they were *controlling* interests." Id. (emphasis added). The Multiple Ownership NPRM also addressed the

rationale of the Commission's policy to treat the interests of non-shareholder officers and directors as cognizable, observing that to do otherwise would ignore the "realities of business organization and *control*" because in many business organizations "the *actual day to day control* is in the hands of *officers and directors* who are not necessarily owners or stockholders." Id. at 366, n. 26 (emphasis added). The policy of treating officers and directors as parties having "actual day to day control" has existed from the inception of the multiple ownership rules. Amendment of Sections 3.35, 3.240 and 3.636, 18 FCC 288, 293 (1953).

In sum, therefore, the Commission's Multiple Ownership NPRM launching the proceeding to amend the multiple ownership rules made no specific proposals to enhance minority ownership, and explicitly affirmed that the cognizable interests of investors, officers, and directors of licensees could be controlling.

2. First Commission Order

In its Report and Order, the Commission decreed that specific incentives to enhance minority ownership should not be part of the multiple ownership rules because "[m]inorities *per se* are no more disadvantaged by marketplace prices than any other small would-be owners." Amendment of Section 73.3555, 100 FCC 2d 17, 49 (1984) ("First Ownership Order"). The Commission thus raised the multiple ownership limit from 7 to 12 stations for a six-year transition period and repealed the limit altogether after six years, concluding that this would not adversely affect minorities and that minority preferences in the multiple ownership rules would be "inappropriate." Id. at 49, 54-55. In setting a fixed 12-station ownership limit, the Commission also rejected arguments that audience reach should be restricted. *See* Dissenting Statement of Commissioner Mimi Weyforth Dawson, id. at 64.

3. Congressional Reaction

Congress responded quickly and decisively, as it had when the Commission initially spurned a minority lottery preference. Barely two weeks after the First Ownership Order was adopted, Senator Pete Wilson (with Senators Inouye, Hatch, and Kennedy) and Congressman Mickey Leland (with Congressmen Dingell and Wirth) introduced legislation to *mandate* the two measures the Commission had just rejected: (a) ownership limits based on audience reach and (b) a specific incentive in the multiple ownership rules to increase minority ownership.[15]

The Wilson bill mandated both 10-station *and* 22½ percent national audience reach limits on VHF station ownership, and a 27½ percent audience reach limit for *all* television ownership. **Tab 9**, pp. 1-2. It further directed that the 10-station limit be increased by two stations, and that the audience reach limits be increased by 2½ percent, for applicants who were "minority controlled." **Tab 9**, pp. 2-3. The bill defined a "minority controlled" station as follows:

> "The term 'minority controlled television station' *means* any television broadcasting station of which not less than 50 per centum is *owned* by one or more members of a minority group (as defined in section 309(i)(3)(ii))." **Tab 9**, p. 3 (emphasis added).

This was a direct reference to the statute in which Congress had previously mandated minority preferences in lotteries and established the beneficial ownership standard for minority control. *See* pp. 18-30 supra. Indeed, the definition of "minority control" in the bill for purposes of an exception to the multiple ownership limits was identical in substance to the Congressional definition for the lottery preference -- namely, more than 50% "owned" by minorities. Consistent with the lottery statute, operating control was not required. Id.

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[15] S. 2962, 98th Cong., 2d Sess. (1984); H.R. 6134, 98th Cong., 2d Sess. (1984). *See* **Tab 9**.

The Leland bill took the same approach. **Tab 9**, pp. 4-9. It mandated audience reach limits, specified a point system for broadcast ownership based on market size, expanded the audience limits and allowable ownership points for applicants that were "minority controlled" and, as the following comparison shows, defined "minority control" the same way Congress had defined it for the lottery preference statute:

§309(i)(3) Lottery Preference Definition	Leland Bill Definition
"The Conferees intend that in the administration of a lottery. . .the Commission award a significant minority ownership preference to those applicants, *a majority of whose ownership interests are held* by a member or members of a minority group." **Tab 8**, p. 7 (emphasis added).	"The term 'minority controlled station' means any broadcast station *the majority interest in which is owned* by one or more members of a minority group (as defined in section 309(i)(3)(C)(ii))." **Tab 9**, p. 8 (emphasis added).

Nor did Congress stop there. On August 22, 1984 (still within a month of the Commission's action), it took the extraordinary step of prohibiting the Commission from spending funds to implement the 12-station limit for television ownership.[16] The legislation directed that:

> "No funds appropriated by this or any other Act to the Federal Communications Commission may be used to implement the Commission's decision adopted on July 26, 1984, in Docket GEN 83-1009 as it applies to television licenses prior to April 1, 1985, or for sixty days after the Commission's reconsideration of its decision in this matter, whichever is later. The term 'implement' shall include but not be limited to processing, review, approval, or acquisition of any interest in or the transfer or assignment of television licenses." **Tab 10**, p. 3.

Congress thus expressed its very strong disapproval of the Commission's refusal to adopt audience reach limits and minority ownership incentives in the new multiple ownership rules, and as with the lottery preference, it forced the Commission to reconsider.

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[16] Second Supplemental Appropriations Act of 1984, Pub. L. No. 98-396, §304, 98 Stat. 1369, 1423 (1984). *See* **Tab 10**.

4. Commission Reconsideration

The Commission resolved Congress' concerns a few months later in a further order in the multiple ownership proceeding. Amendment of Section 73.3555, 100 FCC 2d 74 (1985) ("Second Ownership Order"). Where it previously had rejected national audience reach limits, it now adopted them in line with the pending Wilson/Leland bills. Id., 100 FCC 2d at 88-92. Where it previously had rejected specific minority ownership incentives in the multiple ownership rules, it now adopted such incentives in line with those bills. Id. at 94-95. And, just as the pending legislation defined "minority control" as more than 50% ownership -- the standard in the lottery statute -- the Commission now adopted the same definition:

> "A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. *In the context of the multiple ownership policies, we believe that a* ***greater than 50 percent minority ownership interest*** is an appropriate and meaningful standard for permitting increases to the rules adopted herein." Id. at 95 (emphasis added) (footnotes omitted).

Thus, expressly recognizing that different definitions of minority control applied to the various minority preference programs it administered (*see* pp. 19-20 supra), the Commission chose the minority ownership *per se* standard that came from the lottery statute. It then spelled out that definition in the rule itself (§73.3555(e)(3)(iii)):

> "For purposes . . . of this section, *'minority controlled' means more than 50 percent owned* by one or more members of a minority group." Id. at 100 (emphasis added).

As with the minority LPTV lottery preference, the Commission stated no requirement that the minority owners have operating control in order for the minority exception to apply.[17]

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[17] When the Commission requires that minorities have operating control, it knows how to say (continued...)

a. Commission December 1984 Meeting

The transcript of the Commission's December 1984 meeting at which the minority ownership exception was adopted illuminates these events. Commissioner Quello confirmed the Commission's keen awareness of the need to mollify Congress' displeasure with the agency's original action, stating:

> "I think this is a good, reasoned approach to another contentious problem. I do think, though, that . . . we should take some kind of cognizance of the fact that proposals introduced by Senator Wilson and Congressman Leland were considered in our overall decision. I think we ought to . . . let people know that that's the case. It is a fact, I think we have put it on record by saying that. I think . . . if the Commission expressly notes this, that we did consider these legislative proposals in our reconsideration, it puts it all out . . . in the open. I think it would do some good." **Tab 3**, pp. 6-7.

Commissioner Patrick confirmed that the Commission was adopting the ownership *per se* standard for purposes of the minority ownership exception:

> "Under the majority's plan, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to the issue, the compelling state interest at issue here -- diversity. No concern is given as to whether the 51% minority owners will exert any influence whatsoever on the station's programming or will have any control at all." **Tab 3**, p. 10.

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[17](...continued)
so. *See* Fifth Memorandum Opinion and Order (PP Docket No. 93-253), 10 FCC Rcd 403, 493 (1994), in which the Commission adopted the following definition of "minority-controlled" in §24.720 of its PCS rules: "[T]he term minority-controlled entity shall mean . . . one in which members of minority groups have both ***de jure and de facto*** control of the entity" (emphasis added). The Commission there also gave clear notice of what was meant by "*de facto*" control. Id. at 446-49. Here, the Second Ownership Order adopting the broadcast minority ownership exception could easily have referred to "*de facto*" control, working control, operating control, and/or the applicability of Note 1 if that is what the Commission had meant. It referred to *none* of those things, because that is *not* what the Commission meant.

Chairman Fowler declared that Commissioner Patrick "has it exactly right." **Tab 3**, p. 13. Explaining why he would nonetheless put aside his long-standing objection to preferences based solely on minority ownership without a showing of increased diversity (*see* p. 26 supra), he stated:

> "My opinions on that are well documented and have been on the record since the lottery, which was enacted some time ago by this agency pursuant to legislation. Nonetheless, I will concur on that aspect in the name of preserving the greater whole or the greater good that I think derives from this action of the Commission." **Tab 3**, p. 13.

Thus, Chairman Fowler specifically recounted his opposition to the ownership *per se* standard mandated by Congress in the minority lottery legislation, but said he would *accept* that standard for the minority ownership exception in order to achieve the "greater good" of lifting the Congressional spending ban and implementing the much desired relaxation of the multiple ownership limits.

Commissioner Rivera took no issue with Commissioner Patrick's assertion that minority ownership *per se* was the standard being adopted; he disagreed only with Commissioner Patrick's argument that minority ownership *per se* failed to achieve diversity. **Tab 3**, p. 11.[18]

As noted above, all five Commissioners voted to adopt the item. **Tab 3**, p. 13.

b. Subsequent Events

Subsequent events further confirm that the Commission adopted Congress' beneficial ownership definition for the minority ownership exception. When the Commission released the

[18] Indeed, in his earlier dissent from the Commission's failure to include a specific minority ownership incentive in the Multiple Ownership NPRM, p. 31 supra, Commissioner Rivera had specifically cited the Congressionally-mandated lottery preference as a policy that *did* achieve diversity goals. 95 FCC 2d at 402, n. 5. In "specifying that traditional diversification objectives be promoted in mass media lottery grants," he said, Congress had recognized the "nexus between diversity of media ownership and diversity of program sources." Id. at 402, n. 5. Since minority preferences in mass media lottery grants were based on minority ownership *per se* (pp. 18-30 supra), as the Bureau itself acknowledges, Commissioner Rivera thus correctly maintained that the diversity goals underlying the minority ownership policies could be achieved through that standard.

Second Ownership Report six weeks after the December 1984 meeting, Commissioner Patrick issued a Separate Statement reiterating his opposition to the beneficial ownership standard:

> "Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given as to whether the 51% minority owners *will exert any influence* on the station's programming *or will have any control at all*." 100 FCC 2d at 104 (emphasis added).

Commissioner Patrick went on to describe the minority ownership approach he preferred. That approach was to perform a case-by-case analysis to determine whether the degree of minority involvement in station affairs -- including, *inter alia*, participation in management or "other influential roles" such as sitting on the board of directors -- would contribute to diversity. Id. But the approach he preferred was *not* the one adopted. The Commission's standard gave no concern to whether the minority owners even exercised influence, let alone control. All that mattered was beneficial ownership.

Again, no one disputed that Commissioner Patrick in his Separate Statement had articulated the Commission's policy, in Chairman Fowler's words, "exactly right." This is legally significant, because a statutory construction stated in a separate or dissenting opinion which is undisputed by the majority will be taken to reflect the view of the majority as well. Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 908 (1st Cir. 1988) ("none of the other justices rejected the dissent's alternative statutory interpretation"). *See also*, Schedule of Fees, 50 FCC 2d 906, 907-08 (¶5) (1975) (recognizing that statutory interpretation stated in dissenting opinion uncontradicted by majority is authoritative).

Three months later, in June 1985, the Commission adopted the Minority Incentive Reexamination, which stressed that the minority ownership exception was based on the aggregate "equity ownership" alone without regard to operating control. *See* p. 10 supra. The Commission is fully aware that the term "equity ownership" encompasses interests that have nothing to do with operating control. *See, e.g.*, BBC License Subsidiary L.P., 10 FCC Rcd 10968, 10973 (¶25) (1995) (equity ownership may be divorced from voting rights and is synonymous with beneficial ownership); 47 CFR §20.6(d)(2) (referring specifically to "non-controlling equity" interests). Indeed, the very concept of aggregating equity ownership to determine eligibility for the minority preference had originated with Congress' mandate that a minority lottery preference be awarded for ownership interests that could be entirely *passive*.

That broadcaster/investors were permitted to exercise operating control of minority licensees under the minority ownership exception was also clear to The Washington Post Company and its counsel, Covington & Burling. In their comments in Minority Incentive Reexamination, they observed:

> "[T]he 'minority incentive' provisions have an *independent attraction* for investors who wish to be active in the broadcast industry, since they allow the acquisition of *control* of 14 stations, rather than just 12, if at least two are minority-controlled. By contrast, the 'single majority stockholder' exception does not increase the number of stations an investor can *control* -- it merely allows him to invest in additional stations that he *cannot control*. Thus, an investor interested both in the *control* of broadcast companies and in increasing his broadcasting investments *might well take advantage of the 'minority incentive' provisions* while also investing in 'single majority stockholder' stations." **Tab 11**, p. 5 (emphasis added).

In short, like the LPTV abuse of process issue, designation of the *de facto* control and multiple ownership abuse issues in this case was based on the erroneous premise that operating control determined eligibility for the minority ownership exception. The pertinent record establishes

that, as with the minority LPTV lottery preference, Congress and the Commission intended the minority ownership exception to apply *whether or not* minorities exercised operating control of the licensee. By failing to consider *any* of that record, the HDO improvidently designated these issues. As shown next, the HDO also failed to consider the law of "cognizable" interests, which likewise establishes that designation of the Trinity qualification issues was erroneous.

E. The Holder of a Cognizable Interest May Exercise *De Facto* Control

The specific incentive the Commission chose to induce broadcasters to provide financing and management expertise to minority-owned stations was to allow broadcasters to hold additional "cognizable" interests in such stations. *See* pp. 10-13 supra. As the Commission of course knew, "cognizable" interests by definition were those that convey to the holder "the ability to materially influence or control the business affairs of our licensees." Minority Incentive Reexamination, p.11 supra, **Tab 4**, p. 1. Indeed, in the very NPRM that led to adoption of the minority ownership exception, the Commission observed that cognizable interests are generally treated like "controlling interests" and that "the actual day to day control" of licensees realistically "is in the hands of officers and directors who are not necessarily owners or stockholders" at all (let alone controlling stockholders). Multiple Ownership NPRM, pp. 31-32 supra. Thus, in permitting broadcasters to take cognizable positions or cognizable ownership interests in minority-owned stations, the Commission contemplated that they could have actual day to day control of such stations. That was a conscious policy decision intended to induce investment in minority-owned stations by enabling broadcaster/investors to ensure the continued viability of their investment. Minority Incentive Reexamination, p. 12 supra, **Tab 4**, p. 4.

The principle that the holder of a cognizable interest could have operating control was well known when the minority ownership exception was adopted in 1984. Just a year earlier, when framing its new broadcast ownership attribution benchmarks in 1983, the Commission made clear that the very premise of attribution was that the holder of *any* cognizable interest could control the licensee. Said the Commission, "the attribution rules implicitly make the assumption that such *control* exists." Notice of Proposed Rule Making, FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983) ("Benchmark NPRM"), **Tab 12**, p. 7 (emphasis added). In a notice that *26* times linked the concepts of cognizable interests and "control" (id.), the Commission proposed to raise the attribution benchmarks to between 5% and 20% and stated:

> "Interests greater than this benchmark but less than majority control will be subject to a rebuttable presumption that the interest held is *controlling*." Id., **Tab 12**, p. 15 (emphasis added).

When the Commission then amended the attribution benchmarks in 1984, just before it adopted the minority ownership exception, it adopted the rebuttable presumption that any cognizable interest was controlling:

> "*Rebuttability of the Benchmark.* While a definite benchmark will therefore be employed to establish cognizable interests, the presumption it establishes will be rebuttable in extreme cases. If an ownership interest is above the benchmark, the holder can attempt to show that the interest should not be cognizable. Such a stockholder will have a heavy burden of proof. The primary factor in such a showing would be a demonstration that *another person (or persons) is in indisputable control* of the licensee." Attribution of Ownership Interests, 97 FCC 2d 997, 1010-11 (1984) (emphasis added).

The presumption that anyone holding a cognizable interest can control the licensee, of course, also underlay the Commission's decision to make non-owner officers and directors cognizable because